BRIEF IN SUPPORT OF PETITION.

INDEX.

CASES CITED.

STATUTES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

No. .....

HENRY GREENBERG,
Petitioner,

v.

I. & I. HOLDING CORPORATION and HARRY BARROW, INC.,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The District Court filed a memorandum opinion on the question involved and the same is printed in full in the record (R. 115, 116).

The opinion of the Circuit Court of Appeals filed November 5, 1945, is not yet reported and for convenience is printed in the certified record.

Statement of the Case.

A statement of the matter involved has been fully presented in our petition and the Court is respectfully referred to pages 1 to 9 therein. In the interest of brevity, the statement is not repeated here.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the order of the District Court.

2. In holding that objection by a creditor to the filing of a petition for arrangement before a Referee in Bankruptcy, upon the ground that petitioner has previously been denied a discharge in the same bankruptcy proceeding upon objection of said creditor, is *res judicata*.

3. In holding that the Referee in the original proceeding upon his own motion, without a hearing wherein proof of the debtor's lack of right to a discharge upon creditor's objections might be shown, must summarily dismiss the debtor's petition for arrangement filed under Sec. 321 of the Chandler Act.

4. In holding that the filing of the petition under Sec. 321 of the Chandler Act, 11 U. S. C. A. Sec. 721, and confirmation thereunder, does not supersede all prior proceedings, including the question of the previous discharge of the bankrupt.

5. In holding that the rule applicable in cases arising in bankruptcies prior to the Chandler Act that a denial of a discharge in a prior bankruptcy or composition proceeding was *res judicata* in a subsequent proceeding in bankruptcy supplied binding analogies under the Chandler Act, wherein a pending proceeding alone was involved.

6. In holding that the mere similarity between incidences of certain sections of Chapter XI in cases arising under Secs. 321 and 322 furnished a criterion of congressional intention as to the construction of the former section.

7. In construing Sec. 321 so as to discriminate against the debtor within the meaning of the "due process" guaranty of the Amendment to the Constitution of the United States.

Summary of Argument.

POINT 1. The summary dismissal of a petition for an arrangement filed in a pending bankruptcy proceeding Sec. 321 of the Chandler Act (11 U. S. C. A. Sec. 721) upon the ground that petitioner had previously been denied a discharge in the bankruptcy proceeding has no support in the wording adopted or the policy contemplated by Congress in enacting the debtor relief proceedings through the radical revision in 1938 of the Bankruptcy Act of 1898.

POINT 2. A petition for arrangement might be filed by a debtor under Sec. 322 of the Chandler Act (11 U. S. C. A. Sec. 722) in a district where he was residing after he had changed his residence from the district wherein he had been denied a discharge in the original Bankruptcy proceeding, which had been closed. Such petition is not subject to summary dismissal. This difference constitutes discrimination against petitioner herein in violation of the "due process" guaranty of the Fifth Amendment to the Constitution of the United States.

POINT I.

No provision of Chapter XI of the Chandler Act sustains a power in the judiciary to dismiss summarily a petition for an arrangement filed thereunder upon the ground that the petitioner had been denied a discharge in a pending bankruptcy proceeding.

This supposed power has been read into the Act as the result of a judicial gloss stemming from an interpretation of Sec. 14 of the Bankruptcy Act of 1898 (11 U.

S. C. A. Sec. 32) prior to its amendment in 1903. *Freshman* v. *Atkins*, 269 U. S. 121, decided in 1925, is the principal authority relied upon in the opinion below. In that case, there had been two bankruptcy petitions filed by the same party in the District Court. The application in the first proceeding was never acted upon. The second petition as to creditors included in the first proceeding was dismissed. The court, upon its own initiative, took judicial notice of the former application. This dismissal was sustained in this Court upon the following ground (269 U. S. at 123).

> "The refusal to discharge was not on the merits but upon the procedural ground that the matter could not properly be considered or adjudged except upon the prior application."

In other words, as the Court stated previously therein (*ibid*), "the pendency of a prior application for discharge is available in abatement as in the nature of a prior suit pending, in accordance with the general rule that the law will not tolerate two suits at the same time for the same cause." Thus, the dismissal was strictly in accord with the virtually universal recognition of the rule that a plea in abatement lies to dismiss the second of two identical suits or actions.

The result of this analysis of *Freshman* v. *Atkins, supra*, demonstrates that the discussion of the effect of a prior denial of a discharge as a bar by Mr. Justice Sutherland, who delivered the opinion, was dicta or, at most a resort to an unessential *ratio decidendi* by way of analogy. The result of his uncalled for distinction of *Bluthenthal* v. *Jones*, 208 U. S. 64, in the course of this discussion will be considered under Point II herein. The crux of his opinion according to the view expressed in the instant case by the Circuit Court of Appeals for the Sec-

ond Circuit was the following passage from *In re Fiegenbaum,* 121 Fed. 69, 70, decided on February 25, 1903 by the Circuit Court of Appeals for the Second Circuit. .

> "Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, *in limine,* so flagrant an attempt to circumvent its decrees" (quoted 269 U. S. *supra,* at 124; see also herein, R., p. 50).

In re Fiegenbaum, supra, involved, however, a transparent attempt to effect a brazen evasion, if not a fraud, upon court and creditors. Circuit Judge Coxe in the opening sentence of the opinion set forth tersely the facts and the issue raised by this attempt (121 Fed. at 70):

> "The simple question presented by this review is whether a bankrupt, who has been refused a discharge, after full hearing, on the ground that he has fraudulently concealed assets from the trustee, will be permitted, within a few months thereafter, to file a second petition alleging the same facts and prosecute a new application for a discharge."

The Record on Appeal therein shows that the first petition was filed on or about April 28, 1899 (ff. 6, 57). The second petition was filed on or about November 9, 1901 (f. 4). The order to continue under the second petition was entered as of January 23, 1902 (ff. 85-90). Hence, the entire proceedings were governed throughout by Sec. 14 of the Bankruptcy Act of 1898, 11 U. S. C. A. Sec. 32, prior to its amendment by Congress on February 5, 1903. As the text of this original act shows, a discharge was denied where the bankrupt had "(1) com-

mitted an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained" (Sec. 14 (b) [1] [2], 11 U. S. C. A. Sec. 32 (b) [1] [2]; cf. *Bluthenthal* v. *Jones*, 208 U. S., *supra*, at 65).

In the *Fiegenbaum* case, the Referee had reported in the first proceeding that the bankrupt had been guilty of the fraudulent concealment of assets with intent to defeat the Bankruptcy Law (f. 68). This report had been made on or about March 26, 1901 (*ibid*). It was in the face of this report, that petitioner had filed his second petition in November of the same year.

If *In re Fiegenbaum, supra*, therefore, should not be confined to its particular facts, it ought at least not be expanded into a general principle for a mechanical application of the doctrine of *res judicata* to dispose summarily of petitions for arrangement filed under Sec. 321 of Chapter XI (11 U. S. C. A. Sec. 721). There is, besides, no escape from the same fate for petitions filed in like circumstances by wage earners under Section 621 of Chapter XIII (11 U. S. C. A. 1021), if the opinion sought herein to be reviewed is left undisturbed.

The expansion, by repeated amendments of the scope of what was originally Section 14 (b) [1] [2] (11 U. S. C. A. Sec. 32 (b) [1] [2]) has led to the denial of discharge for misrepresentation under the present form of Section 14 (c) [3], 11 U. S. C. A. Sec. 32 (c) [3], where no appreciable loss was suffered by the objecting creditor (*In re Weinstein*, 34 F. 2d 964—S. D. California—1929) or where proof of deliberate or intentional fraud on the part of the bankrupt was entirely lacking (*In re Fineberg*, 36 F. 2d 392—W. D. New York—1929).

Under such circumstances, if a petition for an arrangement or for a wage earners' plan is subject to sum-

mary dismissal as in the case at bar, these debtor relief provisions in many instances will become dead letters (note 1).

It should be noted that apart from the *Fiegenbaum* case, *supra*, Mr. Justice Sutherland cites no authority, nor does he otherwise state, in *Freshman* v. *Atkins*, 269 U. S., *supra*, at 123, 124 the rule that a court must take judicial notice of, and give effect to, its own records in another and interrelated proceedings (*supra*, at 124). This power generally speaking, would seem to be discretionary (*ibid*).

In the delicate area of state and federal jurisdiction, the earlier practice which made a federal proceeding, *in personam*, *res judicata* as against the initiation of a similar proceeding in a state court has been decidedly, if not altogether, curtailed (*Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118).

Analogous considerations of delicacy, accorded traditionally by an appellate tribunal to the trier of the facts, would point to the existence of a similar principle hostile to the summary dismissal of the petition in the instant case. These considerations of delicacy are buttressed by the far weightier factor of the new philosophy towards debtors' rehabilitation incorporated into the final chapters of the Chandler Act. This policy or philosophy is at variance with the aims of the framers of the Bankruptcy Act of 1898, which are still operative in large measure under Chapters I-VII, inclusive, of the Act of 1938. Consequently, the denial of a discharge under those Chapters should not be *res judicata* under Chapters XI and XIII.

Collier on Bankruptcy (14th Ed.) Vol. 8, 280, states:

> "In a broad sense, debtor relief proceedings as well as proceedings under Chapters I to VII of the

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Note 1—See the recent argument of Referee Carl D. Friebolin against the retention of Section 14(c) (3) in the Chandler Act (Journal of the National Association of Referees in Bankruptcy Vol. 20, pages 3-4). It is submitted that the replies thereto, especially that of Mr. Parker, strengthen his position.

> Act are bankruptcy proceedings; if they were not bankruptcy proceedings, in the sense that the statutory provisions which authorize them did not constitute laws on the subject of bankruptcies, then those statutory provisions would not come within the constitutional grant of power to establish uniform laws on the subject of bankruptcies, and they would therefore be unconstitutional. But the Act itself does not use the words 'bankruptcy proceeding' in that broad sense, but uses them to distinguish the ordinary bankruptcy proceeding under Chapters I to VII from the debtor relief proceedings under other chapters of the Act."

There was palpably a new proceeding instituted by the filing of the petition for arrangement herein. The circumstance that for convenience in administration the incidences of the original proceeding remain operative (Secs. 325, 332, 352-354 of Chapter XI: 11 U. S. C. A. Secs. 725, 732, 752, 754) does not, contrary to the opinion of the Circuit Court of Appeals here in question (R., p. 51), override the major purpose of the Congress to afford every opportunity for an embarrassed debtor to obtain rehabilitation under federal law. Unless the debtor is given a hearing as to the validity of the creditors' objections based upon the effect of the previous denial to him of a discharge in bankruptcy he has not been given this opportunity.

POINT II.

The change of residence of the debtor to a federal district other than that in which he was residing, when he filed his petition in bankruptcy and was denied a discharge, entitles him to a hearing before the Referee upon the present petition for arrangement as to the effect of the denial of said discharge. A denial of this right constitutes discrimination within the interpretation of the "due process" clause of the Fifth Amendment to the Constitution of the United States.

If the pending bankruptcy proceeding had been closed, petitioner would have had the unquestioned right to file a petition for arrangement under Section 322 (11 U. S. C. A. Sec. 722), in the district of his residence. This section reads:

> *Same; original petition*
>
> "If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication."

The conclusion would seem irrefutable that this would be a new proceeding under Chapter XI. The duty of the objecting creditors to prove that the previous denial of a discharge was a bar to the petition for arrangement is thoroughly established.

In *Bluthenthal* v. *Jones,* 208 U. S. 64, the bankrupt was denied a discharge in the Southern District of Georgia. Subsequently, he filed a bankruptcy petition in the Southern District of Florida. Judgment-creditors, who objected successfully in the first proceeding, though notified of the second proceedings, did not prove their claim nor partici-

pate therein. When they subsequently sought to enforce their judgment, it was held that it was barred by the discharge in the second proceeding. Mr. Justice Moody, in delivering the opinion of this Court, declared (65, 66):

> "Though Bluthenthal & Bickart were notified of the proceedings on the second petition in bankruptcy and their debt was scheduled, they did not prove their claim or participate in any way in those proceedings. They now claim that their debt was not affected by the discharge on account of the adjudication in the previous proceedings.
>
> • • • There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in sec. 14 of the bankruptcy act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his dis-

charge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection."

If the debtor herein had filed his petition for arrangement in the district court of his present residence, there would be no compulsion upon that court summarily to dismiss his petition upon the basis of judicial notice taken by the court of its own records. Thus, in what is submitted to have been the unnecessary treatment of the prior effect of discharge in bankruptcy by Mr. Justice Sutherland in *Freshman* v. *Atkins*, 269 U. S. *supra*, at 124, he has merely this to say of the above quoted opinion of Mr. Justice Moody:

> "There is nothing in *Bluthenthal* v. *Jones*, 208 U. S. 64, to the contrary. There the previous denial of a discharge had been in another court sitting in another state. This court held that, while an adjudication in bankruptcy, refusing a discharge, came within the rule of *res judicata*, the court in which the second proceeding was brought was not bound to search the records of *other* courts and give effect to their judgments." (Italics are those of Mr. Justice Sutherland.)

According to *Freshman* v. *Atkins*, *supra*, therefore, there is apparently no pronouncement of this Court to

eliminate the existence of the necessity, which is indicated by the opinion in *Bluthenthal* v. *Jones*, 208 U. S., *supra*, at 65, for the objecting creditors to establish the provability of their claims. A condition precedent, for pleading or otherwise bringing to the attention of the court in another district proof as to the effect of the prior denial to a petitioner of his application for a discharge, must be satisfied under such circumstances by the objecting creditors.

An interval of more than two years occurred between the affirmance of the order of the Referee denying a discharge in the pending bankruptcy proceeding and the filing of the petition for arrangement. There is no fact stated in the opinion of the Circuit Court of Appeals herein nor does the Record reveal that the statute of limitations during this period did not bar the claims of the objecting creditors. Within that lapse of time, at least, the debtor has never been immune from the commencement of actions against him.

From this more or less fortuitous circumstance that the pending bankruptcy proceeding was never closed, the debtor has been denied a hearing on the validity of the creditors' objections to his discharge, although they do not in any way impugn his good faith in changing his residence to another district. It is submitted that the result of such a construction of Section 321 of the Chandler Act will tempt undischarged bankrupts in the future to aid the closing of pending proceedings promptly and then move to another district wherein there is no recognition of the mandatory power of the federal judiciary summarily to dismiss a petition for arrangement. It is further submitted that the consequence of such a variance in the application of Section 321 constitutes discrimination against the debtor herein within the guaranty of "due process" of the Fifth Amendment (cf. *Detroit Bank* v. *United States*, 317 U. S. 329, 338 and authorities there cited).

Such a grave constitutional doubt should be obviated by an interpretation of Section 321 in the liberal spirit of the framers of the Chandler Act (*United States* v. *Jin Fuey Moy*, 241 U. S. 394). This would require a hearing at which the objecting creditors would have to establish the provability of their claims whether by reason of the running of the statute of limitations or any other intervening defense in order to oppose a rehabilitation proceeding upon the ground that the petitioner for arrangement had previously been denied a discharge in bankruptcy.

CONCLUSION.

For the reasons heretofore assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

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